

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

**IN RE: BAIR HUGGER FORCED AIR
WARMING DEVICE PRODUCTS
LIABILITY LITIGATION**

MDL No. 15-md-02666 (JNE/DTS)

**This Document Relates to:
George Tawes, 0:18-cv-00678-JNE-DTS**

**RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FOR
FAILURE TO COMPLY WITH PRETRIAL ORDER NO. 14**

Plaintiff, George Tawes (hereinafter "Mr. Tawes") submits this Response in Opposition to Defendants' Motion to Dismiss.

INTRODUCTION

3M Company and Arizant Healthcare, Inc. ("defendants") ask this Court to dismiss Mr. Tawes's case with prejudice, because as of September 6, 2018, Plaintiff failed to cure core deficiencies following Defendants' final deficiency letter. However, counsel asserts that this is not the case and that the PFS corresponding deficiencies were cured prior to defendants' Motion to Dismiss.

FACTS

Counsel filed Mr. Tawes's complaint on March 9, 2018. Counsel submitted a completed PFS on May 9, 2018. On June 6, 2018, the defendants issued a deficiency on his PFS (**Exhibit A**). Plaintiff responded to the deficiency on June 14, 2018 with the following response (**Exhibit B**):

“Section II:

09) Florida Jr College of Jacksonville- Jacksonville, FL 1978-1978 –

GED-General

Section III:

01) These questions are unclear whether they are seeking plaintiff's independent knowledge or whether attorney has information to answer these questions.
The instruction in bold before these questions is to produce responsive information that is in the possession of plaintiff or plaintiff's attorney. In the spirit of cooperation, plaintiff's attorney responds to answer question 1 as “yes” and provides the specifics regarding proof that a Bair Hugger System was utilized:

- a. In the intra-operative nursing notes, a forced air warming device was shown to have been utilized.*
- b. Plaintiff's attorney discovered this information.*
- c. Unknown at this time; Discovery is ongoing.*
- d. Unknown at this time; Discovery is ongoing.”*

Defendants' then filed a Motion to Dismiss for failure to comply with Pretrial Order No. 14 where for the first time they state that they need to know the specific date that plaintiff's counsel became aware that a Bair Hugger was utilized during Mr. Tawes's initial surgery. Counsel attempted to meet and confer with defendants and informed defendant that plaintiff did not have prior personal knowledge of a Bair Hugger being used. Additionally, plaintiff's counsel provided the following date on which we received records indicating that a Bair Hugger was utilized.

“George Tawes—we received records confirming Bair Hugger usage on 11/27/2017”

Defendants then said plaintiff needed to provide the exact document in which Bair Hugger usage was shown, even though that was not pointed out in any prior deficiency notice. Counsel then provided the exact document indicating Bair Hugger usage to defendant (**Exhibit C**). Defendants then stated that now, for the first time since January of 2017, they will no longer accept service of responses via email or U.S. mail and will not stand down from their Motion to Dismiss until an amended PFS is uploaded via the portal with a signed verification, even though Mr. Tawes has already provided 1 verification page of deficiency responses. Plaintiff’s counsel have always responded to deficiencies in writing via email and U.S. mail and have done so for over a hundred cases and now at this time, after filing a motion to dismiss, defendants counsel will no longer accept the response via email or U.S Mail. Plaintiff’s counsel has continued to cooperate with Defendant’s on curing deficiencies.

ARGUMENT

Mr. Tawes submitted his PFS and cured his deficiency in a timely manner. Therefore, the plaintiff respectfully requests this Honorable Court deny the defendants’ Motion to Dismiss Mr. Tawes’ case with prejudice.

Dated: September 13, 2018

Respectfully submitted,

**LEVIN, PAPANTONIO, THOMAS, MITCHELL,
RAFFERTY & PROCTOR, P.A.**

/s/ Daniel A. Nigh

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